IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 466

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

versus

LOUISIANA PUBLIC SERVICE COMMISSION, MIDDLE SOUTH UTILITIES, INC., and LOUISIANA POWER & LIGHT COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR REHEARING OF LOUISIANA PUBLIC SERVICE COMMISSION.

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Now comes Louisiana Public Service Commission and petitions for a rehearing of the decision of this Court (*Per Curiam*) rendered on May 13, 1957, and for grounds thereof, respectfully avers:

I.

In the Court's *per curiam* opinion it is stated (p. 3) that "the offer of proof" submitted by the Louisiana Public Service Commission did not "indicate any change in conditions" since the divestment order of March 20,

1953. We suggest that a full consideration of the said offer of proof will show the following "changes of conditions":

(1) Since the 20-day notice hearing of February 19-20, 1953, the Louisiana Public Service Commission has had the opportunity to consider the effects of disposition as respects the public interest, and the interest of consumers, and has made a formal finding (Tr. pp. 42-43) that such disposition would be "contrary to the public interest", particularly the interests of the gas and electric customers of Louisiana Power & Light Company. Such formal determination, which was not before the SEC at the time of its order of March 20, 1953, **is clearly a changed condition.**

(2) At the invitation of the SEC, the Louisiana Commission has had its staff make a detailed study of the actual results of separation. This study, which is part of the offer of proof and uncontested, shows a very large annual loss of economies ($957,000 per annum) which would result from the separation. This annual loss is a great deal larger than that estimated by Louisiana Power in its testimony before the SEC in the February 19-20, 1953, twenty day notice hearing. The standard to be applied here, "loss of **substantial** economies" is clearly a quantitative standard, and a showing of much larger loss of economies in 1955 certainly has a bearing on their substantialness and surely **represents a changed condition.** Whether or not there is a sufficient change is a question which goes to the heart of the matter, but that this is a relevant "change in conditions" cannot be doubted.

(3) The Commission also offered to prove that ex-

perience had since the original order, which experience was not available at the time of the March 20, 1953 order, had clarified the question of where the public interest in this matter lay—

(a) It offered to show the adverse experience of Arkansas and Mississippi Power & Light Companies which had disposed of their gas properties (Tr. p. 39).

(b) It offered to show the complementary nature of the gas and electric properties, which has been very greatly enhanced since the 1953 order due to the development of the air conditioning load in recent years. (Tr. pp. 37, 38).

(c) It offered to show a recent comparison of Louisiana Power's cost of gas operations with those of the most nearly comparable companies operating only gas properties, which comparison clearly demonstrated the advantage of combined operation.

All of the above represent considerations not before the Commission when it entered its order of 1953, based on developing conditions in the industry.

(4) The Commission also pointed out that the SEC order of March 20, 1953, was based on **two** misinterpretations of the standards for retention prescribed by the Act. These misinterpretations are cumulative in effect. In other words, the order of March 20, 1953 was based on two false assumptions. We submit that the establishment that the order was based on two false assumptions—or even one—constitutes a showing that conditions on which the order was based do not exist.

II.

The undisputed record in this case is that the carrying out of the SEC disposition order will result in great prejudice to the public interest and to the interest of consumers. The lower court merely remanded the case for further opportunity to present countervailing evidence, if any.

This Court in its *per curiam* simply held that the last sentence of Section 11(b), providing that **any order** under Section 11(b) is appealable, did not apply to an order reaffirming a prior order, where the SEC had fully and completely reconsidered the prior order, in the light of important new evidence produced by a responsible State regulatory body after lengthy argument.

This construction given by the Court of the wording of the last paragraph of Section 11(b) is certainly not the only reasonable construction of this language. Yet this Court has made its construction without giving its reasons for so holding.

The last paragraph of Section 11(b) reads as follows:

> "The Commission may by order revoke or modify any order previously made under this sub-section, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this sub-section shall be subject to judicial review as provided in section 79X of this title."

This Court has held in its *per curiam* opinion that the last sentence of the paragraph quoted above only applied to orders which may "revoke or modify" orders previously made under sub-section (b) of Section 11 of

the Act, and did not apply to an order which denied revocation or modification, although the SEC had fully and completely reconsidered the prior order in the light of voluminous new evidence produced by responsible state regulatory body going to the question of changed conditions.

The construction placed on these vital sentences by the Court, we submit, is contrary to reasonable interpretation of the language, and is in opposition to the Legislative history in connection with this particular language.

The first sentence of the quoted paragraph grants to the Commission power, whether on its own motion or as the result of a party's motion, to issue an order revoking or modifying **any order** previously made under this entire sub-section (b) of Section 11 of the Act, commonly referred to as the "heart of the Act." The second sentence of the paragraph expressly makes **ANY** order made under this sub-section subject to judicial review. This last sentence of the paragraph does not limit the orders subject to judicial review only to those orders which are affirmative in nature, i.e., orders which **do** revoke or modify a previous order; clearly, without such a limitation, the sentence can only be reasonably interpreted to mean that orders, either affirmative or negative in nature, i.e., orders **refusing** to revoke or modify, are subject to judicial review.

To interpret this language otherwise would be illogical since it would give appellate review only to affirmative orders—orders upon which a moving party would need no review since the Commission would have granted the motion. On the other hand, if the interpretation placed upon this paragraph by the Court were

correct, there would be a necessary conclusion that the Congress intended that due process was to be denied in this particular instance. We say this because, if a moving party could show "conditions upon which the order was predicated" did not exist and the Commission arbitrarily or capriciously denied a motion to revoke or modify a previous order, then, under this Court's interpretation, the party offended by this arbitrary or capricious refusal would have no right to review and no recourse to appellate procedures to correct an arbitrary or capricious act by the Commission.

Although petitioner for rehearing did not in its original argument of this matter point out to the Court the Legislative history we note that the matter was before the Court through the brief of Louisiana Power on page 23 where the Congressional Record is quoted as follows:

(74th Cong., 1st Sess., Cong. Rec. 8946)

> "Mr. Borah: 'In other words, **all these orders** which would be made with reference to reorganization and so forth would be appealable to the court.'
>
> "Mr. Wheeler: 'Absolutely.'" (emphasis added)

Despite exhaustive research we find no other debate, reports, or other material which refutes or negates in any way this express intent of Congress, as stated by the Act's leading proponent.

III.

Lest the Court erroneously assume that the interests of the Louisiana Commission and Louisiana Power are identical in this matter, we wish to emphasize that the

interest of the Louisiana Commission is quite apart from and considerably greater than that of Louisiana Power. If the ordered disposition is consummated, Louisiana Power will undoubtedly obtain a price for its gas properties at least equal to the original cost less depreciation on which it is allowed to earn the rate of return fixed by this Commission, and probably more inasmuch as reproduction costs are much higher and the territory served is growing. Louisiana Power can invest such proceeds in other electric properties, since its present annual construction budget for electric properties far exceeds what it will obtain for the gas properties. On this reinvestment Louisiana must, of course, be allowed to earn a fair rate of return.

CONCLUSION

The persons primarily here concerned, therefore, are the electric and gas customers whose interest it is the duty of this Commission to protect. The Louisiana Public Service Commission, therefore, says with all the earnestness at its command that its interest is not so much that of Louisiana Power and Middle South as it is that of protecting the public interest and the electric and gas consumers. In this interest, we earnestly urge that this Court reconsider this matter and grant the Louisiana Commission a rehearing so that this case may be remanded to the SEC for further proceedings.

STAY OF MANDATE

Should the delays for filing this petition expire in vacation or the Court fail to act upon this petition prior to vacation, for the reasons hereinabove set forth it is respectfully requested that the Court should stay its

mandate in this case until disposition of the petition for rehearing.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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